No. 83-1894 (9)

In the Supreme Court of the United States

OCTOBER TERM, 1984

PATTERN MAKERS' LEAGUE OF NORTH AMERICA, AFL-CIO, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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QUESTION PRESENTED

Whether the National Labor Relations Board acted within the scope of its authority in deciding that a union rule preventing members from resigning from the union during a strike, or at a time when a strike appears imminent, impermissibly abridges the Section 7 rights of employees to refrain from engaging in union activities.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 724 F.2d 57. The decision and order of the National Labor Relations Board (Pet. App. 9a-44a), including the decision of the administrative law judge, are reported at 265 N.L.R.B. 1332.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 1983. On April 10, 1984, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including May 18, 1984. The petition was filed on May 18, 1984, and granted on October 1, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at App., *infra*, 1a-2a.

STATEMENT

1. In May 1976, the Pattern Makers' League of North America, AFL-CIO (the League), amended its constitution to provide (Pet. App. 10a-11a, 28a n.3):

> [N]o resignation or withdrawal from an Association, or from the League, shall be accepted during a strike or lockout, or at a time when a strike or lockout appears imminent.

This provision, known as League Law 13, was ratified by the membership of the League's various local associations and became effective in October 1976 (*id.* at 30a).

On May 5, 1977, following expiration of a collective bargaining agreement, the League's Rockford and Beloit associations (the Union or the local unions) began an economic strike against members of the Pattern Jobbers Association, a multi-employer group of manufacturers in Rockford, Illinois and Beloit, Wisconsin. Approximately 43 members initially participated in the strike. Pet. App. 10a-11a, 26a-27a, 30a. Beginning in the fifth month of the strike, around September 11, 1977, and continuing until December 1977, eleven members submitted letters of resignation to the local unions and subsequently returned to work (Pet. App. 11a, 27a-28a; GCX 2-10, 23).[1] The initial resignations occurred in

[1] On October 29, 1984, this Court granted the parties' joint motion to dispense with the filing of a joint appendix, but the record before the Board has been lodged with the Court. "GCX" references are to the General Counsel's exhibits introduced at the hearing before the administrative law judge. "RX" references are to the Union's exhibits. "Tr." refers to the transcript of the hearing.

September at about the time the local unions formally rejected a contract offer from the employers' association that had been made the previous July (Tr. 153-155). Also around that time, officers of the League and the local unions held a meeting attended by about 60 members at which the officers threatened members with physical harm and loss of accrued pension benefits if they crossed the picket line (Pet. App. 31a-32a). The first letter of resignation, from member William Kohl on September 11, stated, "I no longer feel that the union officers are acting in the best interest of the men. We need fair and reasonable negotiators to solve our problems" (Pet. App. 28a & n.1; GCX 2). On October 17, member Pierre LaBounty submitted a resignation letter stating, "I have always believed in the Union and I always will. I have never wanted to leave the Union for any reason, however, it has come down to my family and a hardship. For this reason I must go back to work, and to do this, I must resign from the Union." Pet. App. 28a n.1; GCX 7.

The strike ended on December 19, 1977, after the membership had accepted the employers' contract offer and the parties signed a new collective bargaining agreement (Pet. App. 11a, 27a). By letters dated January 26, 1978, the local unions notified the individuals who had attempted to resign during the strike that their resignations violated League Law 13 and were not accepted, and that fines had been levied against them in an amount roughly equal to their

earnings during the strike (Pet. App. 11a, 28a; GCX 13-20, 24; RX 1, at 45).[2]

2. The Board, substantially adopting the findings and conclusions of the administrative law judge, found that the League and the local unions, petitioners here, violated Section 8(b)(1)(A) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(b)(1)(A), by fining, pursuant to League Law 13, individuals who had resigned from the Union and had then returned to work while the strike continued. In so finding, the Board relied on its decision in *Machinists Local 1327, International Association of Machinists* (*Dalmo Victor*), 263 N.L.R.B. 984, 986 (1982), enforcement denied, 725 F.2d 1212 (9th Cir. 1984), petition for cert. pending, No. 84-494 (filed Sept. 27, 1984), in which the Board invalidated fines pursuant to a similar constitutional provision and held that "a union rule which limits the right of a union member to resign only to nonstrike periods constitutes an unreasonable restriction on a member's Section 7 right to resign." Pet. App. 12a-13a.[3] The Board ordered petitioners to

[2] Unlike the other members who attempted to resign during the strike, member William Kohl was expelled from the Beloit Association following his resignation and return to work. The Union notified Kohl on February 1, 1978 that he would be required to pay $4,200 in fines, back dues in the amount of $211, an additional three months' dues in advance, and a $500 fee in order to be readmitted to the Union. Pet. App. 28a-29a. In the meantime, on January 14, 1978, the Union had requested that Kohl's employer discharge him because he was not a member of the Union as required by the union security provision of the new contract (Pet. App. 29a).

[3] In *Dalmo Victor* the Board invalidated a rule restricting a member's right to resign. Two Members were of the view that any restriction on resignation is invalid under Section 8(b)(1)(A). Two other Members would have permitted a resignation restriction to be effective 30 days from submission.

In *International Association of Machinists, Local Lodge 1414 (Neufeld-Porsche-Audi)*, 270 N.L.R.B. No. 209 (June 22, 1984), the Board adopted the position of the concurrence in *Dalmo Victor* that the Act permits no restriction on the right of union members to resign. The Board's decision in *Neufeld-Porsche-Audi* is set forth in an appendix (at 93a-126a) to the Board's petition for certiorari in *Dalmo Victor*. *NLRB* v. *Machinists Local 1327, International Association of Machinists*, No. 84-494 (filed Sept. 27, 1984).

cease and desist from imposing fines pursuant to League Law 13 on members who resign during a strike and return to work, and to rescind the fines imposed (Pet. App. 17a-18a).[4]

3. The court of appeals enforced the Board's order. In upholding the Board's conclusion that the Union's imposition of fines to enforce League Law 13 violated the Act, the court rejected petitioners' con-

[4] In addition, the Board found that petitioners violated Section 8(b)(1)(A) by threatening members with physical harm and loss of accrued pension benefits if they crossed the picket line, and that the Beloit Association violated Section 8(b)(2) and (1)(A), 29 U.S.C. 158(b)(2) and (1)(A), by conditioning William Kohl's readmission on payment of the fine, dues and excessive fees, and by attempting to have him discharged for his failure under those circumstances to meet the membership obligation imposed by the contractual union security provision (Pet. App. 10a n.3, 37a-38a & n.17). The Board also found that the Beloit Association violated Section 8(b)(2) and (1)(A) by demanding employee John Nelson's discharge in January 1978 for failure to meet the obligations imposed by the union security clause because the Union had never fulfilled its fiduciary duty of explaining to Nelson what his obligations were and Nelson had not joined the Union (Pet. App. 14a-17a). These findings were not contested in the court of appeals and are not in issue here.

tention that the restriction on resignation is protected by the proviso to Section 8(b)(1)(A) allowing a union "to prescribe its own rules with respect to the acquisition or retention of membership" (Pet. App. 4a-7a). Relying on *Scofield* v. *NLRB*, 394 U.S. 423 (1969), the court found that because such a restriction "completely suspends an employee's right to choose not to be a union member and thus no longer subject to union discipline, it frustrates the overriding policy of labor law that employees be free to choose whether to engage in concerted activities" (Pet. App. 6a).

The court also rejected the proposition that, by joining the union and participating in the decision to strike, members forfeited their Section 7 (29 U.S.C. 157) right thereafter to change their minds and abandon the strike by resigning from the union (Pet. App. 5a-7a). The court, citing *NLRB* v. *Granite State Joint Board, Textile Workers Union*, 409 U.S. 213 (1972), stated that "[t]he Section 7 right to refrain from union activities encompasses the right of members to resign from the union. * * * An employee's right to resign cannot be overriden by union interests in 'group solidarity and mutual reliance * * *' upon which the Union so heavily relies." Pet. App. 5a-6a (citation omitted). The court added that "[j]ust as the Union's power may not extend to an employee's post-resignation activities, it also may not extend to forbid an employee from resigning" (*id.* at 7a). Accordingly, the court concluded that the proviso to Section 8(b)(1)(A) does not allow a union to "compel membership during a strike * * * in derogation of an employee's right to choose whether to be a part of such * * * activity" (Pet. App. 7a).

INTRODUCTION AND SUMMARY OF ARGUMENT

In this case the Board has ruled that a union may not restrict a member's right to resign and thus may not extend its disciplinary authority to fine an employee who has unambiguously chosen to terminate his membership. Petitioners represent the Board's ruling as a novel, misconceived and unsettling intrusion into the overall regime of rights and responsibilities fashioned by Congress and elaborated by this Court to govern national labor relations. The precise contrary is the case. The principle proclaimed by the Board—that union discipline is predicated on full membership and that membership must be a voluntary relation—is a logical corollary of the Congressional mandate that employees shall have the right "to form, join, or assist labor organizations" (Section 7) as well as the right "to refrain from any or all of such activities" (*ibid.*). As the legislative history shows, this latter right to refrain from concerted activity is not intended to be simply a once-and-for-all choice, made by an employee when he decides to join the union, which thereafter can be reconsidered only on such terms as the union permits. Nor may the privilege of participation as a union member be extended to employees only on the condition that they accede in advance to restrictions on their right to resign that membership.

1. The Supreme Court, beginning with *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967), has drawn the contours of a union's power over its members on the premise of voluntary membership. The rule announced by the Board in this case simply completes the Court's conception in the only way that makes sense. In the *Allis-Chalmers* case the Court recognized, and in *NLRB* v. *Boeing Co.*, 412 U.S. 67

(1973) refused to involve itself in, the disciplinary authority of a union over its members. But this reticence on the Court's part was emphatically predicated on the wholly voluntary nature of the individual's submission to the union through membership.

In *NLRB* v. *General Motors Corp.*, 373 U.S. 734 (1963), the Court made clear that even Congress's reservation in Section 8(a)(3) of the NLRA of a right of the union to insist on a union security clause went no further than to oblige an employee to pay a fee to cover the cost of the union's activities as the employees' exclusive bargaining representative under the majority rule principle of *J.I. Case Co.* v. *NLRB*, 321 U.S. 332 (1944). Full membership in general and submission to union discipline in particular could not be required. And just as entrance into full membership could not be required, so the Court has held that a union's disciplinary power ought not to survive a member's resignation, even though (in *NLRB* v. *Granite State Joint Board, Textile Workers Union*, 409 U.S. 213 (1972)) the member had participated in a strike vote, and even though (in the Court's more recent and unanimous opinion, *Booster Lodge No. 405, International Association of Machinists* v. *NLRB*, 412 U.S. 84 (1973)) a union's constitution to which a member had subscribed forbade strike-breaking on pain of discipline. Although these two decisions declined to pass on the precise issue in this case, it seems a minor stroke indeed to complete the picture and hold, as did the Board here, that just as a union may not extend its power to those unwilling to accede to the rights and responsibilities of membership by a clause purporting to reach post-resignation conduct, so a union may not extend its disciplinary authority over the disaffected by the

merely technical expedient of limiting a member's right to resign.

2. Under our labor laws an employee is bound to bargain collectively through a union selected by the majority of the bargaining unit and, if there is a union security agreement, he may be required to pay for those representation services. Full membership in the union and amenability to union discipline may never, however, be compelled. The scheme which the Board's ruling in this case affirms and completes represents a consistent, coherent and fair balance of the individual employee's rights and responsibilities in respect to the collectivity which is his mandatory representative in collective bargaining.

The argument of petitioners and the amicus that the Board's ruling disregards those collective responsibilities and allows the individual to "ride free" on the union's sacrifices—to take benefits without accepting the burdens—is an argument without merit and at any rate contradicts the basic premises of our labor laws. Petitioners and the amicus urge that the Board's rule be rejected as it would undermine a union's ability to enforce its position when it counted most: in the focused struggle of a strike. This argument is misconceived. The Court has consistently made clear that such enforced solidarity is not the policy of our labor laws: "the vitality of § 7 requires that the member be free to refrain in November from the actions he endorsed in May and that his § 7 rights are not lost by a union's plea for solidarity or by its pressures for conformity and submission to its regime" (*Granite State*, 409 U.S. at 217-218). The only solidarity which the union is entitled to *enforce* is that which comes from its position as exclusive bargaining agent—*i.e.*, every employee's obligation to pay

the costs reasonably related to the union's duties as exclusive bargaining agent. *Ellis* v. *Railway Clerks*, No. 82-1150 (Apr. 25, 1984), slip op. 11-12; *J.I. Case* v. *NLRB*, *supra*; *NLRB* v. *General Motors Corp.*, *supra*. Nor is it the case that an employee who returns to work while others are on strike "rides free" on their sacrifices in some way not contemplated by the labor laws. This Court has made clear that an employee is absolutely free *never* to submit to such union discipline as is exerted against members during a strike, since an employee may never be compelled to accept full membership as a condition of employment. *NLRB* v. *General Motors Corp.*, *supra*. In *Granite State* and *Booster Lodge* this Court also made clear that a renunciation of the mutual reliance on union solidarity is not inconsistent with national labor policy.

At any rate the "free rider" argument is substantially flawed on its own grounds. Where a union security agreement is in effect the employee has paid and must continue to pay a fee to the union for its collective bargaining services; and in resigning his membership he forfeits his voice in choosing the union's leadership and in formulating its policies—most particularly in formulating its bargaining position and in deciding whether to begin or continue a strike.[5] Wellington, *Union Fines and Workers' Rights*, 85 Yale L.J. 1022, 1045-1043 (1976).

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[5] Moreover, since each employee is bound by the union's representation in collective bargaining (*J.I. Case* v. *NLRB*, *supra*), if the former union member's return to work weakens the union's bargaining position, he will suffer the resulting loss along with all the other employees in the bargaining unit.

In sum, far from undermining the proper balance between union solidarity and individual employee choice, the Board's rule, based as it is on two decades of this Court's exposition of Congressional intent, strikes the proper balance and indeed furthers union democracy. To quote from Dean Wellington (85 Yale L.J. at 1045):

> [U]nions are meant to be democratic institutions. If unfettered freedom to resign so depletes a union's ranks over time that the strength of its strike is sapped, one is tempted to say that the members have spoken, the consensus has evaporated, and the strike should come to an end.

3. The legislative history of the Taft-Hartley Amendments of 1947 confirms that Congress intended to adopt the concept of voluntary unionism, and abolish the requirement that employees submit themselves to union membership and discipline as a condition of employment; the union could require only the payment of dues and fees—"financial core" membership —under a valid union security agreement. At the same time, Congress amended Section 7 of the NLRA to provide employees with the "right to * * * refrain from any or all [concerted] activities," and in Section 8(b)(1)(A) made it an unfair labor practice for a labor union to restrain or coerce employees in the exercise of that right. The sole exception to the Section 7 right to refrain referred to the financial core membership provision. The debates show that these provisions were designed to protect union members, as well as other employees, from union coercion, and specifically to protect their right to return to work during a strike. In this context, the failure to adopt a provision in the House bill expressly referring to the right to resign reflects simply the

conclusion that the provision was redundant and thus unnecessary. Similarly, the context and discussion of the proviso in Section 8(b)(1)(A) protecting the union's right to prescribe rules with respect to "the acquisition or retention of membership" refers simply to rules relating to admission to or expulsion from the union—it does not permit the union to detain unwilling members.

4. Even if Congress's and the Court's mandate on this matter were unclear, which we deny, still the ruling of the Board as the expert agency interpreting that mandate should be upheld so long as it represents a reasonable accommodation of divergent strands in the labor acts, in the legislative history and in the Court's decisions. See, *e.g.*, *NLRB* v. *Weingarten, Inc.*, 420 U.S. 251, 260 (1975). Deference to the Board's expertise is particularly appropriate in this case, which involves the formulation of a prophylactic rule to protect the employee's right of association in the light of the realities of industrial relations.

ARGUMENT

THE NLRB REASONABLY CONCLUDED THAT A UNION RULE THAT RESTRICTS MEMBERS FROM RESIGNING FROM THE UNION DURING A STRIKE OR AT A TIME WHEN A STRIKE APPEARS IMMINENT IMPERMISSIBLY ABRIDGES THE SECTION 7 RIGHT OF EMPLOYEES TO REFRAIN FROM ENGAGING IN UNION ACTIVITIES

A. Prior Decisions Of This Court Establish That Congress Intended To Protect The Freedom Of Employees To Resign From A Union And Escape Union Discipline As A Fundamental Policy Of The Act

Section 1 of the NLRA, 29 U.S.C. 151, declares it "to be the policy of the United States to * * * protect[] the exercise by workers of full freedom of association * * *." To that end, Section 7 (29 U.S.C. 157) protects the right of employees "to self-organization [and] to form, join, or assist labor organizations," as well as the right "to refrain from any or all of such activities." Section 8(b)(1)(A) (29 U.S.C. 158(b)(1)(A)) makes it an unfair labor practice for a union to "restrain or coerce * * * employees in the exercise of the rights guaranteed in section 7." The proviso to Section 8(b)(1)(A) states that the Section "shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein."

Consistently with the policy of protecting workers' full freedom of association, unions may impose discipline under the Act only on employees who choose voluntarily to become and remain full union members. This Court's cases have predicated the union's power to discipline its members on the concept that the employee is a *voluntary* member of the union. The Court first established in *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967), that the exercise of union disciplinary power over present members does not constitute "restraint" or "coercion" of a Section 7 right within the meaning of Section 8(b)(1)(A), on the explicit premise that such members, after all, have voluntarily submitted themselves to union authority (388 U.S. at 196-197). See *NLRB* v. *Boeing Co.*, 412 U.S. 67, 71-72 (1973). In subsequent cases it emphasized this element of voluntary submission to union disciplinary powers. The Court held that Section 8(b)(1)(A) prohibits a union from disciplining employees who resign union membership and thus choose no longer to submit to the union's authority. *NLRB* v. *Granite State Joint Board, Textile Workers Union*, 409 U.S. 213 (1972). The Court subsequently made clear that an employee remains free to resign and re-

turn to work even though the union's constitution, to which the employee has subscribed as a member of the union, forbids strikebreaking on pain of discipline. *Booster Lodge No. 405, International Association of Machinists* v. *NLRB*, 412 U.S. 84 (1973). In both circumstances the Court held that the imposition of discipline impermissibly restricts the exercise of the right to refrain from union activity that is guaranteed by Section 7.

Thus in *Allis-Chalmers*, the Court's holding that a union's imposition of court-enforceable fines on full members pursuant to a rule against strikebreaking did not violate Section 8(b)(1)(A) depended on the premise that "[f]ull union membership [was] not compelled" and that employees were "required only to become and remain 'a member of the Union * * * to the extent of paying * * * monthly dues'" under a union security agreement (388 U.S. at 196 (citation omitted)). The Court, citing *International Association of Machinists* v. *Street*, 367 U.S. 740 (1961), indicated that union members remained free to escape union discipline by resigning (388 U.S. at 196-197 & n.36);* and the fines were upheld because the Court found no evidence in *Allis-Chalmers* "that any of the fined employees enjoyed other than full union membership" (388 U.S. at 196).

Similarly in *Scofield* v. *NLRB*, 394 U.S. 423 (1969), in finding lawful a union rule enforcing a production ceiling on union members who worked on a piece work basis, the Court observed that "a union member, *so long as he chooses to remain one*, * * * is subject to union discipline" (*id.* at 429 n.5 (emphasis supplied)). And it noted that "there is no showing in the record that * * * membership of [the protesting members] in the union was involuntary" (*id.* at 430). The Court stated (*id.* at 435 (emphasis supplied)):

> If [union] members are prevented from taking advantage of their contractual rights [under the piece-work system] * * * it is because they have chosen to become *and remain* union members. * * * If a member chooses not to engage in this concerted activity and is unable to prevail on the other members to change the rule, then he may leave the union and obtain whatever benefits in job advancement and extra pay may result from extra work * * *.

The Court in *Scofield* emphasized that a union rule governing members' conduct is valid under Section 8(b)(1)(A) where it is enforced against employees who choose voluntarily to submit to the rule as a condition of retaining union membership and who "are free to leave the union and escape the rule" (394 U.S. at 430).

In furtherance of this basic premise that Section 8(b)(1)(A) permits union discipline only over those who voluntarily are then union members, the Court has invalidated union attempts to discipline former members who have renounced their obligations to the union by resigning. In *Granite State* and *Booster Lodge* the Court held that unions violate Section 8(b)(1)(A) by imposing fines, pursuant to rules prohibiting strikebreaking by members, on employees who

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* In *Street*, the Court held that employees required to pay dues under a union security agreement had a right to relief against a union that used their dues payments for political purposes, but that their "dissent is not to be presumed—it must affirmatively be made known to the union" (367 U.S. at 774). In the present case, the employees' intention to resign was "not * * * presumed" but was "affirmatively * * * made known to the union."

resign union membership before returning to work.[7] The Court in *Granite State* emphasized that the Section 7 right "to refrain from any or all" union activities includes the right "which normally is reflected in our free institutions—the right of the individual to join or to resign from [a union] as he sees fit" and to return to work during a strike. 409 U.S. at 216. It rejected the union's contention that, by participating in a strike vote and the vote to penalize strikebreaking once the strike began, the individuals forfeited their Section 7 rights thereafter to refrain from the strike by resigning from the union. 409 U.S. 216-217. The Court stated (*id.* at 217):

> Events occurring after the calling of a strike may have unsettling effects, leading a member who voted to strike to change his mind. The likely duration of the strike may increase the specter of hardship to his family; the ease with which the employer replaces the strikers may make the strike seem less provident.

And in *Booster Lodge*, the Court was "no more disposed to find an implied post-resignation commitment from the strikebreaking proscription in the Union's constitution here than we were to find it from the employees' participation in the strike vote and ratification of penalties in [*Granite State*]" (412 U.S. at 89). The *Granite State* Court concluded "that the vitality of § 7 requires that the member be free to refrain in November from the actions he endorsed in

[7] In *Granite State* the rule against working during the strike was imposed by a membership vote after the strike began (409 U.S. at 214); in *Booster Lodge* the union's constitution prohibited members from strikebreaking (412 U.S. at 85), and the union alleged that this prohibition had been understood to survive the employee's resignation (412 U.S. at 89).

May and that his § 7 rights are not lost by a union's plea for solidarity" or its reliance on an individual's earlier decision to strike. 409 U.S. at 217-218.

The question presented here is whether a union can evade the protections of employee resignation rights established in *Granite State* and *Booster Lodge* by the simple expedient of including a clause in its constitution restricting the right to resign during a strike. We submit that the union cannot impose a condition on union membership that would require each member to forfeit his Section 7 right to refrain from union activity, and thereby subject to its disciplinary power employees who no longer wish to remain union members and who resigned union membership before returning to work.[8] Although the Court found it unnecessary to decide that precise issue in either *Granite State* (409 U.S. at 216) or *Booster Lodge* (412 U.S. at 88), since there was no clause specifically restricting resignation in those cases, the presence of such a clause in a union constitution is no more compelling a basis for concluding that employees forfeit their Section 7 right to refrain from a strike by resigning from a union than were the factors the Court rejected in *Granite State* and *Booster Lodge*.

A union rule that requires an employee, upon his initial association with his exclusive bargaining representative, to relinquish his Section 7 right to resign

[8] All of the employees who were disciplined by the Union here had submitted letters of resignation to the Union before returning to work (pages 2-3, *supra*). Since the employees made clear their intention to leave the Union, we do not challenge petitioners' suggestion (Br. 38) that the disciplined employees voluntarily joined the Union in the first instance.

during a strike is no more permissible than the surrender of any other statutory rights affecting an employee's decision to choose a bargaining representative or to participate in collective activity. See *NLRB* v. *Magnavox Co.*, 415 U.S. 322, 325 (1974) (invalidating a contract clause waiving the right of employees lawfully on their employer's premises to use their nonworking time to support or oppose the incumbent union); *Local 900, International Union of Electrical Workers* v. *NLRB* (*Gulton, Inc.*), 727 F.2d 1184, 1190 (D.C. Cir. 1984) (rejecting union contention that employees waived the protection of Section 7 by ratifying a contract clause affording superseniority to certain union officers because the Section 7 right at stake—the right to be free of discrimination encouraging participation in union activity—is not waivable); *NLRB* v. *Niagara Machine & Tool Works*, No. 84-4005 (2d Cir. Oct. 12, 1984), slip op. 13-15 (same). See also *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270, 280 (1956); *Metropolitan Edison Co.* v. *NLRB*, 460 U.S. 693, 705-707 (1983). The right to resign from a union in order to refrain from concerted activity is a basic right of association resting on the same legal foundation as the right to choose a bargaining representative that the Court protected against waiver in *Magnavox*.

Petitioners nonetheless seek to justify (Br. 14) a limitation on resignation in a union constitution as a condition of membership that the proviso to Section 8(b)(1)(A) permits unions to impose as part of the union-member "contract." As this Court has made clear, however, the proviso to Section 8(b)(1)(A) does not sanction whatever rule a union might wish to impose on members, but only such rules as "impair[] no policy Congress has imbedded in the labor

laws." *Scofield*, 394 U.S. at 430; accord: *NLRB* v. *Industrial Union of Marine & Shipbuilding Workers*, 391 U.S. 418 (1968) (union rule requiring members to exhaust union remedies before filing unfair labor practice charges with the Board is unenforceable because contrary to the policy of the Act in favor of unfettered access to the Board).[9] Although

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[9] Under the law of contracts, a union constitution is best conceptualized as a contract of "adhesion"—that is, "[t]he member has no choice as to terms but is compelled to adhere to the inflexible ones presented" if he wishes to make his voice heard through his exclusive bargaining representative. Summers, *Legal Limitations on Union Discipline*, 64 Harv. L. Rev. 1049, 1055 (1951) (footnote omitted). It is settled that such a contract is enforceable only to the extent that it is not inconsistent with statutory or other expressed social policies. *Gray* v. *American Express Co.*, 743 F.2d 10, 15-16 (D.C. Cir. 1984). Accord: Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 Harv. L. Rev. 1173, 1206 (1983) ("[o]ne should acknowledge frankly that the question whether to enforce form terms presents a series of policy choices"); Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 Colum. L. Rev. 629, 642 (1943) (The decision whether to enforce contracts of adhesion will depend not only on the "social importance of the type of contract" but also on "the degree of monopoly enjoyed by the author.").

In this connection, it is significant that rules restricting the right to resign from voluntary associations were generally unknown in the common law. Chafee, *The Internal Affairs of Associations Not For Profit*, 43 Harv. L. Rev. 993 (1930). See pages 29-31 & notes 19, 20, *infra*. Moreover, it has been argued that union members are not generally aware of their right to avoid the obligations of full union membership without jeopardizing their jobs, thus casting doubt on the validity of their adhesion to the union-proffered contract in the first instance. Wellington, *supra*, 85 Yale L.J. at 1051-1053; *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. at 215 (Black, J., dissenting).

Although agricultural collectives enjoy a presumptive exemption from the antitrust laws (7 U.S.C. 291, 292), it can

the Court in *Allis-Chalmers*, *Scofield*, and the resignation cases did not face an express restriction on the right to resign, we submit that the fundamental principle of those cases is that the freedom of union members "to leave the union and escape the rule" (*Scofield*, 394 U.S. at 430) underlies the permissibility of all union discipline under Section 8(b)(1)(A), and itself reflects a policy judgment that Congress has imbedded in the Act.

As the Board concluded in *Neufeld-Porsche-Audi*, 270 N.L.R.B. No. 209 (June 22, 1984), and as we show below, this policy is just the logical implementation of the language and legislative history of the Section 7 "right to refrain from any or all [concerted] activities" and the limitations on union or employer conduct impairing that right, embodied in Section 8(b)(1)(A), as well as in Section 8(b)(2), and the second proviso to Section 8(a)(3). Together these provisions serve to prohibit unions from compelling full union membership. *Neufeld-Porsche-Audi*, slip op. 10-11. In addition, as we also show, the language and legislative history of the proviso to Section 8(b)(1)(A) demonstrates that Congress meant only to permit unions to enforce membership rules against individuals for so long as they continue to hold membership voluntarily.[10]

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scarcely be doubted that any effort by such a collective to restrict resignations would be considered a restraint of trade.

[10] As the Board stated in *Neufeld-Porsche-Audi*, slip op. 11:

> [T]he fundamental policy * * * imbedded in the very fabric of the labor laws * * * distinguishes between internal and external union actions. A consistent and enduring basis for distinguishing between internal and external actions is whether the union's action applies only to union members. By unilaterally extending an employee's membership obligation through restrictions on resignation a union artificially expands the definition of internal action and can thus continue to regulate conduct over which it would otherwise have no control * * *.

Finally, whether or not the resigning employees in this case joined the union under the inducement of a union security clause in the original collective bargaining agreement—see notes 2, 8, *supra*—is irrelevant. Even had there been such a clause at the time of their original adherence to full union membership, such adherence would have been as voluntary in the presence of such a union security clause as in its absence, *General Motors*, and the issue in either case is the voluntariness of the adherence to the union after resignation.

B. In Enacting The Taft-Hartley Amendments Of 1947, Congress Proscribed Compelled Union Membership And Protected The Right Of Individuals To Resign From A Union Subject Only To The Requirement That They Pay Dues Under A Valid Union Security Agreement

1. Section 8(3) of the Wagner Act, ch. 372, 49 Stat. 449, permitted unions and employers to enter into agreements requiring that employees become union members as a condition of acquiring employment.[11] Such "closed shop" agreements were widespread and became the primary means by which unions acquired and then exercised power over unwilling members.[12] By threatening employees subject

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[11] The proviso to Section 8(3) stated "[t]hat nothing in this Act * * * shall preclude an employer from making an agreement with a labor organization * * * to require as a condition of employment membership therein * * *."

[12] See Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 Harv. L. Rev. 274, 291-299 (1948); H. Millis & E. Brown, *From the Wagner Act to Taft-Hartley* 435, 440 (1950); Steever, *The Control of Labor Through*

to closed shop agreements with expulsion from the union or a fine enforceable by expulsion, unions enforced adherence to union rules, including those against strikebreaking, under pain of discharge from employment.[13]

Proponents of the Taft-Hartley amendments of 1947 sought the elimination of compelled union membership under closed shop agreements, and the issue was widely debated. See Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 Harv. L. Rev. 274, 291-299 (1948). Congress amended Section 8(3), outlawing closed shop agreements, but permitting agreements under which employees were required to become and remain "members" of the union within 30 days after employment—the union shop agreement. Section 8(a)(3), 29 U.S.C. 158(a)(3). In so doing, Congress provided:

> That no employer shall justify any discrimination against an employee for nonmembership in a labor organization * * * (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

As a corollary, Section 8(b)(2), 29 U.S.C. 158(b)(2), was added, which made it an unfair labor practice for a union "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

Notwithstanding the objections that the amendments would reduce unions' disciplinary powers,[14] Congress made a clear policy choice in favor of voluntary unionism, abolishing the requirement that employees submit themselves to union membership and discipline as a condition of employment. See 93 Cong. Rec. 4885 (1947), 2 *Leg. Hist.* 1419 (remarks of Sen. Ball). Congress permitted only union security agreements that required employees to become a "member" of the union after 30 days of employment. See S. Rep. 105, 80th Cong., 1st Sess. 7 (1947), 1 *Leg. Hist.* 413; *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 40-41 (1954). But only financial membership could be required. The second proviso to Section 8(a)(3), and the corollary Section 8(b)(2) provision, prohibiting union discrimination on grounds related to membership obligations other than failure to pay dues or fees, meant that "union membership" as a condition of continued employment was "whittled down to its financial core." *NLRB* v. *General Motors Corp.*, 373 U.S. 734, 742 (1963); see

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Union Discipline, 16 Cornell L.Q. 212, 214 (1931); S. Rep. 105, 80th Cong., 1st Sess. Pt. 2, at 9-10 (1947) (minority views), *reprinted in* 1 *NLRB Legislative History of the Labor Management Relations Act, 1947*, at 471-472 (1948) [hereinafter cited as *Leg. Hist.*].

[13] See, *e.g.*, *American Telephone & Telegraph Co.*, 6 Lab. Arb. Rep. 31, 34, 45-46 (1947); S. Rep. 105, *supra*, at 9-10, 1 *Leg. Hist.* 471-472; see also Summers, *Disciplinary Procedures of Unions*, 4 Indus. & Lab. Rel. Rev. 15, 26 (1950); Summers, *Legal Limitations on Union Discipline*, 64 Harv. L. Rev. 1049, 1066 (1951) (union rules generally were enforced by suspension, expulsion, or fines enforceable by expulsion).

[14] See S. Rep. 105, *supra*, at 9-10, 1 *Leg. Hist.* 471.

Union Starch & Refining Co., 87 N.L.R.B. 779, 783-786 (1949), enforced, 186 F.2d 1008, 1012-1013 (7th Cir.), cert. denied, 342 U.S. 815 (1951); *Electrical Workers* v. *NLRB*, 487 F.2d 1143, 1167-1168 n.26 (D.C. Cir.), cert. denied, 418 U.S. 904 (1973). Employees governed by union shop provisions could thus elect to become or remain full members or not. As long as employees remained full members they could not be fired from their job for failure to obey union rules, but could otherwise be disciplined by the union.[15] However, if they paid only dues and fees ("financial core" membership), they could avoid the obligations of full union membership—including union discipline for breach of union rules.[16]

2. This limitation on union power is confirmed by the express language of Section 7. At the same time that Congress amended the union security provisions, it amended Section 7 to provide that "[e]mployees shall have the right to * * * refrain from any or all [concerted] activities except to the extent that such

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[15] See 93 Cong. Rec. 4193 (1947), 2 *Leg. Hist.* 1097 (remarks of Sen. Taft).

[16] Under the union security provisions authorized by the Act, employees are free not only to limit their membership to payment of dues at the outset of their relationship with a union, but also to choose to change their status to financial core membership having previously chosen full membership. See *NLRB* v. *Hershey Foods Corp.*, 513 F.2d 1083, 1086-1087 (9th Cir. 1975); *Local 749, Int'l Brotherhood of Boilermakers* v. *NLRB*, 466 F.2d 343, 344-345 & n.1 (D.C. Cir. 1972), cert. denied, 410 U.S. 926 (1973); *Marlin Rockwell Corp.*, 114 N.L.R.B. 553, 559-560 (1955); *United Stanford Employees*, 230 N.L.R.B. 326, 328-329 (1977), enforced, 601 F.2d 980, 982-983 (9th Cir. 1979). Certainly an employee should have no *less* freedom to avoid union discipline when the contract contains no union security clause.

right may be affected by a [union security agreement] authorized in Section 8(a)(3)."[17] Congress thus provided in the clearest possible terms that the "financial core" membership requirements of Section 8(a)(3) were the only permissible restriction on the employee's right to refrain from union activities. With this single limited exception, the employee was to be free to refuse to participate in any collective activity—a freedom that necessarily includes the right to resign from the union and return to work.

Congress implemented the "right to refrain" afforded in the amended Section 7 by adding Section 8(b)(1)(A), which makes it an unfair labor practice for a union "to restrain or coerce * * * employees in the exercise of the rights guaranteed in Section 7." The debate concerning that provision makes clear that the provision, coupled with the amendment to Section 7, was intended to insure that employees, including union members, would be protected against union restraint or coercion in any decision to refrain from union or other concerted activity, including a strike. Thus, when Section 8(b)(1)(A) was introduced on the Senate floor by Senator Ball (93 Cong. Rec. 4016 (1947), 2 *Leg. Hist.* 1018),[18] Senator Ives inquired

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[17] The "right to refrain" language originated in the House bill and was incorporated into the final bill in conference. As conceived in the House bill, the "right to refrain" language "meant simply that a man shall have the right to join or not to join, to be bound by or not to be bound by, union rules." 93 Cong. Rec. 3554 (1947), 1 *Leg. Hist.* 733 (remarks of Rep. Hoffman).

[18] The provision as first introduced made it an unfair labor practice for a labor organization "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." The phrase "interfere with" was subsequently eliminated because it was believed to be too vague. 93 Cong. Rec. 4270-4271 (1947), 2 *Leg. Hist.* 1138-1139.

whether the union security amendments prohibiting compelled membership were not sufficient to prevent the type of union coercive conduct at which the section was aimed. Senator Taft responded that Section 8(b)(1)(A) was designed to prohibit threats, economic reprisals, and other forms of union coercion that would not be reached by the union security amendments. 93 Cong. Rec. 4142 (1947), 2 *Leg. Hist.* 1025-1026. Senator Taft explained that, while the amendment protected employees who may not be members of unions at all, it also was necessary to protect union members from the "arbitrary powers which have been exercised by some of the labor union leaders," which in some cases have subjected them "to treatment which interferes with their rights as American citizens." 93 Cong. Rec. 4023 (1947), 2 *Leg. Hist.* 1028. He added that the amendment merely makes clear that unions, no less than employers, "do not have the right to interfere with or coerce employees, either their own members or those outside the union." 93 Cong. Rec. 4025 (1947), 2 *Leg. Hist.* 1032.

Later in the debates, Senator Taft, in response to the charge that Section 8(b)(1)(A) would prevent unions from engaging in a strike, stated (93 Cong. Rec. 4436 (1947) (emphasis added), 2 *Leg. Hist.* 1207):

> It would not outlaw anybody striking who wanted to strike. It would not prevent anyone using the strike in a legitimate way, conducting peaceful picketing, or employing persuasion. *All it would do would be to outlaw such restraint and coercion as would prevent people from going to work if they wished to go to work.*

And in his supplemental analysis of the conference bill, Senator Taft explained that the "right to refrain"

language in Section 7, coupled with Section 8(b)(1)(A), specifically prohibited "coercive acts of unions against employees who did not wish to join or did not care to participate in a strike or picket line." 93 Cong. Rec. 6859 (1947), 2 *Leg. Hist.* 1623.

3. In sum, by amending the union security provisions, and by expressly protecting the right of union members to refrain from union and other concerted activities free of union coercion, Congress made clear that the assumption of any burdens or obligations of union membership beyond the payment of dues and fees was a purely voluntary matter for each employee, and that, even if an employee had joined the union, he could not be forced to remain a member. For, unless the member were free to resign his membership and thereby avoid union discipline, his Section 7 right to refrain from engaging in union and other concerted activities would be rendered nugatory. Accordingly, the Board correctly concluded that "[t]his statutory right encompasses not only the right to refrain from strikes, but also the right to resign union membership." *Neufeld-Porsche-Audi*, slip op. 10. See also *Marlin Rockwell Corp.*, 114 N.L.R.B. 553, 560 (1965) (emphasis in original) (decision to leave a union after having joined it is "an act not qualitatively different from the refusal by employees *to join* a union").

Petitioners rely (Br. 22-34) on Congress's failure to adopt the provisions of the House bill that specifically protected the right to resign from a union. They incorrectly assert that that failure demonstrates that Congress did not intend to protect the right to resign when it added the "right to refrain" language to Section 7 and enacted the final version of Section 8(b)(1)(A). Section 8(b)(1) of the House bill would have made it an unfair labor practice for a

union, "by intimidating practices, to interfere with the exercise by employees of rights guaranteed in section 7 * * * or to compel or seek to compel any individual to become or remain a member of any labor organization" (H.R. 3020, 80th Cong., 1st Sess. § 8(b)(1), at 21-22 (1947), 1 *Leg. Hist.* 178-179). The Conference Report makes clear that the final version of Section 8(b)(1)(A) was broad enough to include these specific unfair labor practices, and that the House bill's language was therefore merely redundant. H.R. Conf. Rep. 510, 80th Cong., 1st Sess. 44 (1947), 1 *Leg. Hist.* 548.

Section 8(c)(4) of the House bill, which would have made it an unfair labor practice for a union "to deny to any member the right to resign from the organization at any time" (H.R. 3020, *supra*, § 8(c)(4), at 23, 1 *Leg. Hist.* 180), was similarly redundant. Although Section 8(c) generally contained detailed provisions granting new statutory rights to members in their relations with unions, provisions that were rejected in the conference agreement (H.R. Conf. Rep. 510, *supra*, at 46 (1947), 1 *Leg. Hist.* 550), Section 8(c)(4) was intended only to preserve the *existing* right of members to resign. Thus, the House Report on Section 8(c)(4) stated that "[t]he right to resign from any organization is a fundamental right. This section *preserves* that right for union members." H.R. Rep. 245, 80th Cong., 1st Sess. 32 (1947) (emphasis added), 1 *Leg. Hist.* 323. But resigning from a union is merely one way of exercising the right to refrain from joining or supporting a union that was embodied in Section 7. Indeed, this Court so recognized in *Granite State* and *Booster Lodge* in sustaining the Board's conclusion that the unions violated

Section 8(b)(1)(A) by fining employees for resigning from the union and going to work during a strike. Because the more general "right to refrain" language added to Section 7 encompasses the specific act of resigning from the union, it is reasonable to assume that Congress believed that a specific provision covering resignation was unnecessary.

Moreover, Section 8(c)(4) of the House bill appears to have been specifically directed at the burden that closed shop agreements under the Wagner Act imposed on the right to resign. Referring to the House provision governing union security, a provision similar to the provisions in the final bill, the House Report made clear that the right to resign was protected subject only to the requirement that employees governed by union security agreements pay dues. H.R. Rep. 245, *supra*, at 34, 2 *Leg. Hist.* 325. Congress having protected the right to resign in Section 7 and Section 8(b)(1)(A), and having prohibited closed shop agreements in the union security amendments, there was no need for inclusion of House Section 8(c)(4). See F. Hartley, *Our New National Labor Policy* 81-83 (1948) (explanation by sponsor of the House bill that "the union shop provisions prohibiting a labor union from seeking the discharge of any member for any reason other than non-payment of * * * dues * * * will * * * prevent internal labor union abuse" at which parts of Section 8(c) were directed).

This view of the legislative history is buttressed by the fact that, at the time Congress acted, it was generally understood that employees were free to withdraw from a union if they chose. Thus, unions had the authority to prescribe rules governing the conduct of those who chose to maintain membership, but members were free to resign at will, subject only "to

any financial obligations due and owing." *Communications Workers* v. *NLRB*, 215 F.2d 835, 838 (2d Cir. 1954). As the court stated in *Bossert* v. *Dhuy*, 221 N.Y. 342, 365, 117 N.E. 582, 587 (1917):

> Voluntary orders by a labor organization for the benefit of its members and the enforcement thereof within the organization [are] not coercion. The members of the organization * * * who are not willing to obey the orders of the organization are at liberty to withdraw therefrom.

Similarly, the court stated in *Longshore Printing & Publishing Co.* v. *Howell*, 26 Or. 527, 540, 38 P. 547, 551 (1894), "It must be understood * * * that [unions] like other voluntary societies must depend for their membership upon the free and untrammeled choice of each individual member. No resort can be had to compulsory methods of any kind either to increase, keep up, or retain such membership." [19] Given the common law background, and Congress's decision to prohibit compelled union membership and expressly to protect the right to refrain from union activity, there was no need expressly to protect the right to resign.[20]

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[19] See also *Barker Painting Co.* v. *Bhd. of Painters*, 23 F.2d 743, 745 (D.C. Cir. 1927), cert. denied, 276 U.S. 631 (1928); *Arnold* v. *Burgess*, 241 App. Div. 364, 369, 272 N.Y.S. 534, 539 (1934); *Bohn Manufacturing Co.* v. *Hollis*, 54 Minn. 223, 232-233, 55 N.W. 1119, 1120-1121 (1893); *Mayer* v. *Journeymen Stonecutters' Ass'n*, 47 N.J. Eq. 519, 524, 20 A. 492, 494 (1890); *Mische* v. *Kaminski*, 127 Pa. Super. 66, 91-92, 193 A. 410, 421 (1937); *Bayer* v. *Bhd. of Painters*, 108 N.J. Eq. 257, 261-262, 154 A. 759, 761 (1931) (union rules requiring employees to retain membership against their will were unknown at common law); see generally *Developments in the Law—Judicial Control of Actions of Private Associations*, 76 Harv. L. Rev. 983 (1963).

[20] The cases cited by petitioners in support of their argument that unions had the authority at common law to restrict

resignations (Br. 35-38) are far removed from the union-member relationship. Two of the cases stand for no more than that associations at common law could impose certain procedural limitations on withdrawal that did not otherwise impair the right voluntarily to resign (*Colonial Country Club* v. *Richmond*, 140 So. 86 (La. 1932) (resignation notice must be delivered to specified officer)), and could require that financial charges accrued and owing be paid prior to resignation (*Boston Club* v. *Potter*, 212 Mass. 23, 27, 98 N.E. 614, 615 (1912)). In *Ewald* v. *Medical Society*, 144 A.D. 82, 84-85, 88-89, 128 N.Y.S. 886, 888, 891 (N.Y. App. Div. 1911), the court upheld the right of a medical society to protect its professional reputation by processing pending ethical charges against a member prior to accepting his resignation. And in *Associated Press* v. *Emmett*, 45 F. Supp. 907, 919-920 (S.D. Cal. 1942), the court upheld a liquidated damages provision in the amount of two years' dues, and an attendant restriction on withdrawal, in the contract of a worldwide wire service organization with a member newspaper because the wire service was "not in a position, by the very nature of its operations, to rely upon a court to fix the damages at the time of the breach of its membership contract."

The other cases cited by petitioner (*Troy Iron & Nail Factory* v. *Corning*, 45 Barb. 231 (N.Y. 1864); *Leon* v. *Chrysler Motors Corp.*, 358 F. Supp. 877 (D.N.J. 1973), aff'd mem., 474 F.2d 1340 (3d Cir. 1973); and *Kingston Dodge Inc.* v. *Chrysler Corp.*, 449 F. Supp. 52 (M.D. Pa. 1978)), are cases in which members of associations sought to cease paying for services which they continued to receive without giving up any other benefit of membership, and the associations sued to recover the individual's share of payments for those services. Here, union members who resign foreswear the benefit of full membership and even after resigning they may be required to pay the costs of the union in representing the collective bargaining unit under a union security agreement. Thus those cases in no way support the proposition that there is at common law a power in an association to restrict the right to resign or to impose continuing obligations of the kind involved here on those who have resigned.

In any event, we are far removed from a common law setting with respect to how and whether employees associate

C. The Proviso To Section 8(b)(1)(A) Preserves The Common Law Authority Of Unions To Enforce Reasonable Rules Governing The Conduct Of Those Who Choose Voluntarily To Maintain Membership, But Does Not Allow Unions To Force Employees To Retain Membership Against Their Will

1. While prohibiting all forms of compulsion that require any employee to be a member of a union, and protecting the common law right to resign in the "right to refrain" language of Section 7, Congress enacted the proviso to Section 8(b)(1)(A) stating that "this [Section] shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein[.]" Petitioners contend (Br. 14, 18-21, 32) that this proviso further shows that Congress did not intend, by adding the "right to refrain" to Section 7 of the Act, to prevent unions from restricting the right to resign by a provision in a union constitution. This contention is without merit.

At the outset, contrary to petitioners' contention (Br. 18), the plain meaning of the phrase "rules with respect to acquisition or retention of membership" encompasses rules respecting admission or expulsion from the organization—not rules which prevent members who wish to leave the organization from doing so at the time they wish. It simply means that the union need not accept or keep members it does not want; it does not mean that the union can acquire and retain those who wish to refrain from membership. In that respect the statute is symmetrical: membership cannot be forced upon either the union or the employee. Petitioners' reading of this proviso is, therefore, no more than a pun on the meaning of the word retention. The statute obviously was intended to leave unions free to decide who of those who wish to remain members it will retain. It did not address the situation where a union wished to retain—or, perhaps better, detain—a person who no longer wished to be a member.

The legislative history of the proviso confirms this interpretation of its purpose. Section 8(b)(1)(A) as originally offered by Senator Ball (see page 25, *supra*) did not contain the proviso. It was offered by Senator Holland, in the midst of the debate on Section 8(b)(1)(A),[21] after discussing with Senators Taft and Ball "how seriously, if at all, [Section 8(b)(1)(A)] would affect the internal administration of a labor union" (93 Cong. Rec. 4271 (1947), 2 *Leg. Hist.* 1139). Senator Holland stated (93 Cong. Rec. 4271, 4272 (1947) (emphasis added), 2 *Leg. Hist.* 1139, 1141):

> Apparently it is not intended by the sponsors of [Section 8(b)(1)(A)] to affect at least that part of the internal administration *which has to do with the admission or the expulsion of members*, that is with the question of membership. So I offer an amendment [adding the proviso in its present terms].
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with unions. So-called "yellow dog contracts," by which employees agreed with their employer not to associate with unions, are outlawed by Section 7 of the Norris-La Guardia Act, 29 U.S.C. 107.

[21] Section 8(b)(1)(A) was introduced on the floor of the Senate on April 25, 1947, and was discussed that day. On April 29, the union shop and Section 8(b)(2) amendments were discussed. On April 30, discussion of Section 8(b)(1)(A) resumed and the proviso was introduced on that day. On May 2, the Senate adopted Section 8(b)(1)(A) and its proviso. 93 Cong. Rec. 4016, 4191, 4270, 4442 (1947), 2 *Leg. Hist.* 1018, 1094, 1136, 1217.

> In other words, * * * the inserted words would make it clear that the pending amendment would have no application to or effect upon the right of a labor organization to prescribe its own rules of membership either with respect to beginning or terminating membership.

Immediately following the statements of Senator Holland, the debate returned to union security, and Senators Taft, Ball, and Pepper engaged in the following discussion (93 Cong. Rec. 4272 (1947) (emphasis added), 2 *Leg. Hist.* 1141-1142):

> Senator Pepper: In discussion yesterday between the Senator from Ohio [Senator Taft] and myself with respect to another part of the bill, dealing with the closed shop or the union shop, the Senator from Ohio stated what I recall his having stated in the committee, that if a union claimed the advantage or the status of a closed shop or union shop, it would have to have what the Senator called democracy in respect to the admission of members. I understood the Senator to say that that would mean that anyone who presented himself and was qualified in other respects for membership, and who complied with the usual conditions for membership, such as the payment of dues, and so forth, would be entitled to membership.
>
> Senator Taft: I did not say that * * *. *The union could refuse the man admission to the union, or expel him from the union*; but if he were willing to enter the union and pay the same dues as other members of the unicn, he could not be fired from his job because the union refused to take him.
>
> Senator Pepper: Am I correct * * * that there is no provision of the bill which denies a labor union the right to prescribe the qualifications of its members, and that if the union wishes to discriminate in respect to membership, there is no provision in the bill which denies it the privilege of doing so?
>
> Senator Ball: Absolutely not. If the union expels a member of the union for any other reason than nonpayment of dues, and there is a union-shop contract, the union cannot under that contract require the employer to discharge the man from his job. *It can expel him from the union at any time it wishes to do so*, and for any reason.
>
> Senator Pepper: *And the union can admit to membership anyone it wishes to admit*, and decline to admit anyone it does not wish to accept[?]
>
> Senator Ball: That is correct.

The remarks by Senator Holland, the author of the proviso, in the context of the ongoing debate on the effects of Section 8(b)(1)(A) and the union security amendments on union membership rules, demonstrate that Congress intended in the proviso to preserve only the power of unions to *admit* or *expel* individuals wanting to gain or maintain membership. These were the only valid aspects of union power that were mentioned in the debates and inserted into the statutory language. Congress did not intend by the proviso to expand the union's power to prescribe rules restricting the right of members to leave the union if they so desired. If the proviso had the effect which petitioners contend it has, it would overwhelm the employees' Section 7 right to refrain from union activity.

2. The Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 401 *et seq.*, confirms the limited scope of the proviso and the view that Congress intended that union members be free to withdraw from membership. While preserving the power

of unions to fine, suspend or expel members—the traditional forms of discipline—subject to certain procedural safeguards in Section 101(a)(5), 29 U.S.C. 411(a)(5), Congress provided in the definition section (29 U.S.C. 402(*o*) (emphasis added)) that:

> "Member" or "member in good standing," when used in reference to a labor organization, includes any person who has fulfilled the requirement for membership in such organization, and *who neither has voluntarily withdrawn from membership* nor has been expelled or suspended from membership after appropriate proceedings consistent with lawful provisions of the constitution and bylaws of such organization.

In debates on the LMRDA, Representatives Landrum and Griffin, sponsors of the bill that became law, stated their view that the proviso to Section 8(b)(1)(A) adequately protected the power of unions to decide whether to *admit* and *expel* members, and stated further that the LMRDA was not intended to alter the scope of the proviso. 105 Cong. Rec. 15722-15723 (1959), reprinted in 2 *NLRB Legislative History of the Labor-Management Reporting and Disclosure Act of 1959*, at 1649. There is no suggestion anywhere in the legislative history that Congress intended to allow unions to force employees to retain membership against their will during a strike, or at other times. As this Court observed in *NLRB* v. *Truck Drivers Local Union 639 (Curtis Bros.)*, 362 U.S. 274, 291 (1960), "[t]o be sure, what Congress did in 1959 does not establish what it meant in 1947. However, as another major step in an evolving pattern of regulation of union conduct, the 1959 Act is a relevant consideration."

In sum, Congress in 1947 made a clear policy choice in favor of voluntary unionism, prohibiting compelled full union membership under union security agreements and expressly protecting the right of employees to refrain from union activity. The Board reasonably concluded that a rule specifically restricting the right to resign during a strike, no less than the employee votes or constitutional provision asserted in *Granite State* and *Booster Lodge*, violates Section 8(b)(1)(A) by rendering illusory an employee's Section 7 right to refrain from union activity.

D. The Board's Interpretation Reasonably Reflects National Labor Policy

This Court emphasized only last Term that "[w]e have often reaffirmed that the task of defining the scope of § 7 'is for the Board to perform in the first instance as it considers the wide variety of cases that come before it', * * * and, on an issue that implicates its expertise in labor relations, a reasonable construction by the Board is entitled to considerable deference." *NLRB* v. *City Disposal Systems, Inc.*, No. 82-960 (Mar. 21, 1984), slip op. 6 (citations omitted). In this case also the Board has exercised its "primary responsibility of marking out the scope of the statutory language and * * * 'of applying the general provisions of the Act to the complexities of industrial life . . . and of "[appraising] carefully the interests of both sides of any * * * controversy in the diverse circumstances of particular cases" from its special understanding of "the actualities of industrial relations."'" *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 496 (1979) (citations omitted). Thus, even if this Court does not agree with our submission that the Board's construction is compelled by the statute, by

its legislative history and by this Court's prior decisions, that construction is surely at least a *permissible* interpretation of the statute and its underlying policies, and, as such, should be sustained. *NLRB* v. *Weingarten, Inc.*, 420 U.S. 251, 260 (1975); *NLRB* v. *Iron Workers*, 434 U.S. 335, 350 (1978). That free association is the premise of union disciplinary authority according to this Court's decisions cannot be denied. *Allis-Chalmers, Scofield, Granite State, Booster Lodge.* Surely it is competent for the Board—even if it were not compelled by prior decisions—to fashion a strong prophylactic rule to effectuate that general principle in the light of its understanding of the realities of industrial relations.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JANUARY 1985

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended, 29 U.S.C. 151 *et seq.* are as follows:

Section 7, 29 U.S.C. 157.

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8(a), 29 U.S.C. 158(a).

> It shall be an unfair labor practice for an employer—
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization * * * to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employ-

ment or the effective date of such agreement, whichever is the later, * * * *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization * * * if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

Section 8(b), 29 U.S.C. 158(b).

It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of []section [8](a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

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